

STATE OF MICHIGAN
COURT OF APPEALS

CONNIE COLAIANNI ,

Plaintiff-Appellant/Cross-Appellee,

v

STUART FRANKEL DEVELOPMENT
CORPORATION, INC., and K-F LAND
COMPANY, LLC IV,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

June 18, 2009

No. 282587

Oakland Circuit Court

LC No. 2003-051245-NO

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants with regard to plaintiff's negligence claim. Defendants cross-appeal the order denying their motion in limine to prevent plaintiff's proposed experts from testifying. We affirm the order granting summary disposition in favor of defendants.¹

According to plaintiff's complaint, she worked in Daimler-Chrysler's customer service department call center. In April 1998 the call center was relocated to a newly constructed building owned by defendant K.F. Land Company, LLC, IV (KF) and managed by defendant Stuart Frankel Development Corporation (Stuart). Soon after, plaintiff began experiencing sinus problems, sore throats, flu-like symptoms, and chronic fatigue. Plaintiff began treating with doctors shortly after moving into the building. She missed work for long periods of time, and each time she returned to work in 1998 and 1999 her symptoms would worsen. She alleged that the building had a history of water problems associated with roof and window leaks and that she observed stains on ceiling tiles at and near her workstation. In August 2002 her occupational physician indicated that plaintiff had elevated antigen levels to toxic molds. Plaintiff alleged that toxic mold contamination in the building caused plaintiff to suffer "significant health consequences, including chronic fatigue, memory and cognitive dysfunction, psychomotor slowing and weakening, joint pain, moderate neuromuskulatar pain, moderate obstructive

¹ In light of this ruling, we need not address defendants' issue on cross-appeal.

airways disease, dizziness, and headaches.” She alleged that she continued to suffer flu-like symptoms whenever she attempted to return to work, “including sinus problems with post nasal drip, allergies, infections, asthma and laryngitis . . . mononucleosis, numbness, tingling, restlessness, anxiety, sleep disturbance and depression.”

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) asserting that plaintiff’s claim was time-barred. Defendants asserted that plaintiff testified that her symptoms began about two weeks after she started working at the building, that she started treating with doctors in 1998, and that throughout 1998 and 1999 her symptoms worsened whenever she returned to work. Defendants noted that plaintiff confirmed in her deposition that during 1998 and 1999 she felt worse whenever she returned to work, and that she admitted in her deposition that as of November 11, 1999, she suspected that her symptoms were caused by her workplace. Defendants also noted that plaintiff testified that she was very concerned with the air quality in the building and that it was causing her symptoms. Defendants argued that all of the elements of a plaintiff’s cause of action could have been asserted in a complaint in 1999 when plaintiff’s symptoms worsened whenever she was at work. Thus, defendants contended that the allegations in plaintiff’s complaint established as a matter of law that her claim accrued at least as of 1999, that the limitations period ran by the end of 2002, and that plaintiff’s July 17, 2003, complaint was time-barred.

Following a hearing on the motion, the trial court issued an opinion and order on September 29, 2004, denying defendants’ motion for summary disposition. The court, after noting that plaintiff “seems to concede” that her claims were barred by the three-year statute of limitations, MCL 600.5806(10), agreed with plaintiff that the common-law discovery rule applied in this case, and that plaintiff “should not reasonably have discovered her claim before her condition was diagnosed.”

On August 8, 2007, defendants filed a renewed motion for summary disposition under MCR 2.116(C)(7) based on the Supreme Court’s July 25, 2007, decision in *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007). In *Trentadue*, the Court overruled the common law discovery rule relied on by the trial court in this case to sustain these lawsuits. After a hearing on the motion, the trial court granted defendants’ renewed motion.

This Court reviews a trial court’s decision to grant summary disposition under MCR 2.116(C)(7) de novo. *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007). Summary disposition may be granted under subrule (C)(7) when an action is barred by the statute of limitations. *Id.* In deciding a motion under subrule (C)(7), the trial court must accept the plaintiff’s well-pleaded allegations as true and construe them in the plaintiff’s favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The court must also consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id.* “If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay.” *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007). If no material facts are in dispute, the court must decide as a matter of law whether the claim is statutorily barred. *Id.* at 720-721.

Plaintiff's claims are subject to the three-year statute of limitations for injuries to persons and property, MCL 600.5805(10). MCL 600.5827 defines the time of accrual for actions subject to the limitations period in MCL 600.5805(10). *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387 and n 8; 738 NW2d 664 (2007). It provides:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claims accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Because this case is not controlled by any of the sections from MCL 600.5829 to MCL 600.5838, plaintiff's claim accrued at the time the wrong was done, regardless of when damages resulted. For purposes of MCL 600.5827, the term "wrong" refers to the date on which the plaintiff was harmed by the defendant's act, not the date on which the defendant acted. *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 91995). "Accordingly, a cause of action for a tortious injury accrues when all the elements of the claim have occurred and can be alleged in a proper complaint." *Schaendorf, supra* at 512, citing *Stephens, supra* at 539.

In cases where an element of a cause of action has occurred, but is not yet discoverable with reasonable diligence, courts of this state have applied the common law discovery rule. Historically, the discovery rule has governed the date of accrual for certain types of actions in which the defendant's duty and breach predate the plaintiff's awareness of an injury and its cause. See *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993). Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers, or, through the exercise of reasonable diligence, should have discovered, an injury and the causal connection between the plaintiff's injury and the defendant's breach. *Id.* at 16. Application of the discovery rule has been deemed proper because of the latent nature of a plaintiff's injury or an inability to discover the causal connection between the injury and the defendant's breach. *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995). The rationale for applying the discovery rule is to avoid the extinguishment of a cause of action before the plaintiff is even aware of the possible cause of action. *Id.* at 66.

However, in *Trentadue, supra*, the Supreme Court completely eliminated the common law discovery rule in Michigan.² In *Trentadue*, the family of a rape and murder victim brought a wrongful death action against the killer and his employer 16 years after the crime. *Id.* at 382-383. The killer's identity was unknown until DNA evidence linking him to the crime became available less than a year before the action was commenced. *Id.* at 383. The defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the plaintiffs' action was time-barred under the applicable three-year statute of limitations, MCL 600.5805(10). *Id.* at 383. Specifically, the defendants argued that under MCL 600.5827, the claim accrues when the

² We urge the Supreme Court to reconsider its decision in *Trentadue*. Barring a lawsuit because the period of limitations has expired in a case where a claimant was unaware of the basis for the action is a harsh and unjust result.

plaintiff is harmed and, therefore, that the plaintiffs must have commenced the wrongful death action within three years of the victim's death. *Id.* at 383-384. In response, the plaintiff asserted that the discovery rule applied to toll the period of limitations until the identity of the killer was known. *Id.* at 384. Reversing the lower court's decisions in the case, the Supreme Court held that MCL 600.5827 alone governed the accrual of the plaintiff's claims, and that "courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827."³ *Id.* at 382, 385, 389, 391-392, 407. The Supreme Court reasoned as follows:

The Revised Judicature Act, at MCL 600.5838(2), 600.5838a(2), 600.5839(1), and 600.5855, provides for tolling of the period of limitations in certain specified situations. These are actions alleging professional malpractice, MCL 600.5838(2); actions alleging medical malpractice, MCL 600.5838a(2) actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1); and actions alleging that a person who may be liable for the claim fraudulently concealed the existence of the claim or the identify of any person who is liable for the claim, MCL 600.5855. Significantly, none of these tolling provisions covers this situation-tolling until the identity of the tortfeasor is discovered.

In light of the Supreme Court's holding in *Trentadue*, the trial court properly concluded that the discovery rule is inapplicable in this case as a matter of law. After *Trentadue*, the discovery rule only applies if the legislature specifically provides for the discovery rule. Plaintiff's action against defendants is a negligence action. Because there is no common law discovery rule after *Trentadue*, and the statute does not include a legislatively created discovery rule that applied to plaintiff's action, plaintiff cannot invoke the discovery doctrine to toll the running of the statute of limitations.

Plaintiff contends, nonetheless, that when the plaintiff is unaware of any basis for an action, the result of barring any lawsuit because the period of limitations has expired can be avoided by the operation of the common law discovery rule. However, the *Trentadue* Court explicitly held that courts may not employ the discovery rule to toll the accrual date of claims to which MCL 600.5827 applies, and that MCL 600.5827 applies to claims governed by 600.5805(10), as are the claims in this case. See *Trentadue*, *supra* at 387, 391-392, 407.

Plaintiff's argument that *Trentadue* is materially distinguishable from this case is without merit. First, the length of time that a plaintiff delays in filing an action is not relevant to a statute of limitations analysis. *Trentadue*'s analysis was not dependent upon *how* untimely the action was filed, but rather upon the mere fact that the action *was* untimely. Second, contrary to plaintiff's suggestions, Michigan does not recognize a cause of action for continuing negligence. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 341; 568 NW2d 847 (1997). Third, plaintiff did not plead a cause of action for breach of contract, and there is no evidence that defendant entered into a contract with defendants.

³ This is true even when the claimant was unaware of any basis for an action.

Plaintiff asserts that the *Trentadue* Court's construction of MCL 600.5827 deprives her of due process. This argument was considered and rejected in *Trentadue*, which concluded that "A plaintiff's right to due process is not violated because a desired remedy is no longer available; every statute of limitations deprives plaintiffs of a remedy at the moment the period of limitations expires." *Id.* at 403.

Plaintiff also argues that defendants fraudulently concealed the condition of the building, thereby triggering the tolling provision in MCL 600.5855. Plaintiff did not plead fraudulent concealment in her complaint. Rather, she first referred to fraudulent concealment when she moved for reconsideration of the trial court's order granting summary disposition. Plaintiff did not move to amend her complaint. This issue is therefore not properly before this Court.⁴ Raising a new issue in a motion for reconsideration is untimely, and does not properly preserve an issue for appellate review. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117; 724 NW2d 485 (2006). That is the only way the fraudulent concealment issue was raised, and that is insufficient for our review.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Douglas B. Shapiro

⁴ Even assuming that plaintiff's argument is properly before this Court, the argument is without merit. Plaintiff completely failed to present facts to show (1) that the independent testing reports were erroneous at the time of testing, (2) that defendants knew that the test results were erroneous, (3) that defendant used the reports to mislead her about the presence of mold in the building. Plaintiff has simply failed to present any evidence, beyond mere conjecture, that defendants fraudulently concealed the existence of a cause of action.